

No. 10287.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY
NUMBER 52342, and STANLEY GRAHAM BEER, individu-
ally and as representative of the Underwriting Members
of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation,
and UNITED STATES FIDELITY AND GUARANTY COM-
PANY, a corporation,

Appellees.

BRIEF OF APPELLEE CALIFORNIA FRUIT
GROWERS EXCHANGE.

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This appellee adopts the designations used by appellants to designate the parties to this action, namely: Appellants are referred to as "Lloyd's", this appellee as "Fruit Growers", and appellee United States Fidelity and Guaranty Company as "USF&G".

This is an appeal from a judgment, dated and entered August 31, 1942, of the District Court of the United States for the Southern District of California, rendered by the Honorable Harry A. Hollzer in favor of Fruit

Growers in the sum of \$22,019.22 and its costs, taxed in the sum of \$22.14 and reporter's fees in the sum of \$12.40 [Tr. pp. 205-207].

The judgment, approved as to form by the attorneys for both Lloyd's and USF&G, provides as follows:

“It Is Therefore Ordered, Adjudged and Decreed that plaintiff have judgment against defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, for the sum of \$22,019.22, and for plaintiff's costs incurred herein, hereby taxed in the sum of \$22.14, and for reporter's fees in the sum of \$12.40; together with interest on said judgment from the date of this judgment at the rate of seven per cent per annum;

“It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing by reason of this action against defendant United States Fidelity and Guaranty Company, a corporation; provided, however, that in the event defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, shall appeal from this judgment and if it shall be finally determined that plaintiff is not entitled to recover from defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, then plaintiff shall have and recover from defendant United States Fidelity and Guaranty Company, a corporation, the sum of

\$22,019.22, together with interest thereon from the date of this judgment at the rate of seven per cent per annum, and together with plaintiff's costs herein incurred."

All the facts in the case were stipulated to [Tr. pp. 128-133, 134-138, 186-193]. It was stipulated by both Lloyd's and USF&G with Fruit Growers that Fruit Growers was entitled to recover either against Lloyd's or against USF&G. Lloyd's stipulated that in the event the court should hold USF&G not to be liable under its policies of excess insurance, or either of them, Lloyd's would be liable to Fruit Growers, and that judgment might be entered in its favor against Lloyd's in the sum of \$22,019.22. Similarly USF&G stipulated that in the event the court should hold Lloyd's not to be liable under its policy of excess insurance, USF&G would be liable to Fruit Growers, and that judgment might be entered in favor of Fruit Growers and against USF&G in the said sum of \$22,019.22 [Tr. pp. 190-191, paragraph number 7].

Thus there is no controversy over the right of Fruit Growers to recover the sum of \$22,019.22 and its costs against either USF&G or Lloyd's. The controversy rather is whether USF&G is liable to Fruit Growers or whether the liability falls on Lloyd's. This was conceded by both Lloyd's and USF&G by the stipulations above referred to. It was conceded by both Lloyd's and USF&G by the approval as to form of the judgment by the attorneys for both bonding companies. It was further conceded by Lloyd's in its opening brief herein (Appellants' Opening Brief, p. 7).

Fruit Growers, therefore, takes no part in the dispute between Lloyd's and USF&G as to which is liable since

under the judgment of the District Court in the event it should be finally determined that Lloyd's is not liable it is provided that Fruit Growers then have and recover against USF&G. In the event this court should determine that the liability rests upon USF&G rather than upon Lloyd's, Fruit Growers asks that this court direct the Clerk of the District Court to enter judgment in favor of Fruit Growers against USF&G in the sum of \$22,019.22, together with interest thereon from August 31, 1942 at the rate of seven per cent per annum, together with Fruit Growers' costs of suit.

Respectfully submitted,

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